

Supreme Court, U. S.
FILED

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MICHAEL ROBAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

No. 76-41

FIRST NATIONAL BANK OF HOLLYWOOD, DOROTHY
BUCHMAN and SANDER BUCHMAN, as Executors
of SAMUEL BUCHMAN, Deceased.

Petitioners,

-against-

AMERICAN FOAM RUBBER CORP., MILTON R. ACKMAN,
as Trustee of American Foam Rubber Corp.,
Bankrupt,

Defendants,

MARIE LOUISE de MONTMOLLIN, ALEXANDER F.
PATHY and SUZANNE M. PATHY,

Defendants-Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No.

FIRST NATIONAL BANK OF HOLLYWOOD, DOROTHY
BUCHMAN and SANDER BUCHMAN, as Executors
of SAMUEL BUCHMAN, Deceased,
Petitioners,

-against-

AMERICAN FOAM RUBBER CORP., MILTON R.
ACKMAN, as Trustee of AMERICAN FOAM RUBBER
CORP., Bankrupt,
Defendants,

MARIE LOUISE de MONTMOLLIN, ALEXANDER F.
PATHY and SUZANNE M. PATHY,

Defendants-Respondents.

ON PETITION FOR WRIT OF CERTIORARI
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RESPONDENTS' BRIEF IN OPPOSITION AND
CONDITIONAL CROSS-PETITION FOR WRIT
OF CERTIORARI

Defendants-Respondents, MARIE
LOUISE de MONTMOLLIN, et al. ("defendants")
oppose the granting of the petition for
certiorari for the reasons stated briefly
below. In the alternative, and in the
event that the petition of plaintiff is
granted, defendants respectfully cross-
petition for a writ of certiorari to review
the portion of the order of the court below
dealing with "The Loan Transaction". As
authority for such cross-petition, defendants
respectfully refer to Pierson v. Ray, cert.
granted, 384 U.S. 938, decided on merits,
386 U.S. 547 (unreported chronology discussed
in 1 West's Federal Forms §280 (1969)).

The Petition Was Not
Timely Filed

On March 26, 1976 the court below
denied motions to reargue. The time to file
a petition for certiorari expired on the
ninetieth day thereafter, June 24, 1976. The
petition herein was filed on or about July 13,
1976. For that reason alone it must be denied.

The Petition Is Without Merit

Rule 19 of the Supreme Court

Rules provides that:

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor.

The first four of plaintiff's "Reasons For Granting Writ" require no extended answer. It is probably correct that "[t]he legal issue in this case is one of first impression", but that is no ground for granting the writ. The second, third and fourth reasons are hardly more than chatter, more appropriate for a business column in a newspaper than for a petition for certiorari.

The fifth reason is the alleged conflict among circuits. It is purportedly based upon reported cases. Typical of the cases cited is Bank of America Nat'l Trust

& Sav. Ass'n v. Erickson, 117 F.2d 796

(9th Cir. 1941). It is not "in conflict with" the decision plaintiffs request this Court to review. It is one of dozens of decisions upholding the power of a bankruptcy court to subordinate claims on legal or equitable grounds. None of the other cases cited poses any conflict.

The decision below is not in conflict with "the commercial and historical development of the subordination agreements and judicial holdings." On the contrary, if a pattern can be traced, it is one calling for writers of subordination agreements to state the rights and duties of the parties with increasing care and particularity, and not to foist upon courts the obligation to write in additional provisions. As the court below, after referring to "the remote chance that bankruptcy might someday occur and the senior creditor might

thereafter be deprived of a double dividend",
stated:

We think that if the senior creditor would prohibit a discharge because of such remote contingencies, he should so provide in the subordination agreement.

Conditional Cross-Petition For
Writ of Certiorari To The United
States Court Of Appeals For The
Second Circuit

Defendants petition for a writ of certiorari to review "The Loan Transaction" portion of the judgment of the United States Court of Appeals for the Second Circuit, the writ to issue, however, only in the event that this Court grants the petition for writ of certiorari in No. , this Term.

Question Presented

Whether the court below erred in holding that the loan transaction was not a

series of bookkeeping entries between parent and subsidiary and therefore that payment had occurred.

Statement

Defendants-petitioners rely on the statement of the Loan Transaction of the United States District Court, Southern District of New York, as set out in plaintiff's petition Appendix B at 36a-38a.

Reason For Granting The Writ

Set out herein is a brief in opposition to plaintiff's petition for a writ of certiorari, setting forth the reasons why that issue does not warrant review by this Court. While the question posed in this cross-petition does not call for independent review by the Court, it nevertheless should be reviewed if, but only if, the Court grants the petition in

No. , this Term. Substantial justice requires that the two transactions, litigated together for sixteen years and inextricably tied by the facts, including Buchman's conspiracy, be ruled on together by this Court, if it is to rule on one of them.

Conclusion

For the foregoing reason, it is respectfully submitted that, if the Court grants the petition for writ of certiorari in No. , this Term, then in the interest of justice, it should also grant this conditional cross-petition for a writ of certiorari.

Respectfully submitted,

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